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VIA ELECTRONIC FILING

The Honorable Denis R. Hurley
United States District Court Eastern
District of New York
100 Federal Plaza
P.O. Box 9014
Central Islip, New York 11722-9014

Re: Robert Novak v. Overture Services, Inc., et al.
Civil Action No. 02-5164-DRH-JO

Your Honor :

We are local counsel representing defendant Overture Services, Inc. ("Overture") in the above-referenced action. We write in connection with Google Inc.'s December 29, 2004 letter and plaintiff's December 30, 2004 letter, both referencing the Court's December 22, 2004 order closing the case.

We write to request that plaintiff's voluntary dismissal of his claims be "with prejudice." If plaintiff's claims are dismissed with prejudice, Overture will agree to bear its own costs and fees and to dismiss its counterclaim with prejudice.

Fed. R. Civ. P. 41(a)(2) provides that, after the defendant has answered, except where all parties agree to a stipulation of dismissal, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." At this point in the litigation, voluntary dismissal without prejudice is not a matter of right. Factors relevant to the consideration of a motion to dismiss without prejudice include: (1) the plaintiff's diligence in bringing the motion; (2) any 'undue vexatiousness' on plaintiff's part; (3) the extent to which the suit has progressed, including the defendant's efforts and expenses in preparation for trial; (4) the duplicative expense of relitigation; and (5) the adequacy of plaintiff's explanation for the need to dismiss. *See Zagano v Fordham University*, 900 F.2d 12, 14 (2d. Cir. 1990) (affirming dismissal of plaintiff's case with prejudice when plaintiff refused to proceed to trial after court denied plaintiff's motion to dismiss without prejudice).

All of these factors weigh in favor of dismissing plaintiff's claims with prejudice rather than without prejudice. Plaintiff's complaint was originally filed on September 24, 2002. On October 28, 2002, Overture filed its answer and counterclaim. In the intervening two years, motions to dismiss of other defendants were filed, briefed and ruled upon, and discovery commenced. The parties attended several court conferences, most recently on July 15, 2004. On October 27, 2004, Overture served Requests for Admission, Interrogatories and Document Requests on plaintiff. On December 10, 2004, Overture served a deposition notice on plaintiff. Plaintiff has yet to respond to any of Overture's discovery, and there is no agreed date for Mr. Novak's deposition. Letters are currently pending before Magistrate Judge Orenstein regarding these discovery issues.

For his part, plaintiff has not served on Overture any discovery nor scheduled any depositions on his behalf. Instead, plaintiff has waited until several weeks prior to the January 14, 2005 end of discovery to voluntarily dismiss his claims. Plaintiff provides the Court with no reason to support his unilateral request to discontinue the litigation.

For all of these reasons, Overture requests that the Court: (1) reject plaintiff's request for dismissal without prejudice; and (2) dismiss plaintiff's claims with prejudice. Should the Court dismiss plaintiff's claims with prejudice, Overture consents to the dismissal of its counterclaim with prejudice.

Respectfully submitted,

s/Suzanne M. Berger
Suzanne M. Berger
SMB/cj

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